SUPREME COURT OF THE UNITED STATES

October Term, 1981

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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NO. 81-761

JAMES H. ARMISTEAD,

Petitioner,

v.

CALIFORNIA STATE PERSONNEL BOARD and DEPARTMENT OF WATER RESOURCES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD DISTRICT

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QUESTIONS PRESENTED

1. Did respondents violate appellant's rights under the Fourteenth Amendment of the U.S. Constitution to due process of law in failing to pay him full back salary after the California Supreme Court had determined that he had been wrongfully deprived of his state employment by respondents' failure to afford him "due process" under the Fourteenth Amendment?

2. Is that portion of California Government Sec. 19630 requiring a state terminated employee to file his petition which includes back salary within ninety days after the final decision of the board unconstitutional as being violative of the "equal protection" clause of the Fourteenth Amendment of the U.S. Constitution?

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Petitioner respectfully prays that a writ of certiorari issue to review the decision of the Court of Appeal of the State of California, Third District, dated February 4, 1981, in favor of respondents and against petitioner on his appeal from a judgment adverse to him in the Superior Court of the State of California, for the

County ot Sacramento. Petitioner's petition for rehearing was denied by the Court of Appeal on March 5, 1981. A petition for a hearing filed on behalf of petitioner herein was denied by the Supreme Court of the State of California on April 15, 1981. A subsequent petition for a rehearing filed by petitioner in propia persona was denied by the California Supreme Court June 11, 1981, on the ground that the Court was without jurisdiction to reconsider its decision.

OPINION BELOW

Attached hereto as Appendix "A" is the February 4, 1981 unreported opinion of the Court of Appeal of the State of California, Third District, affirming the judgment of the trial court below rendered in favor of respondents herein.

JURISDICTION

The final order of the Supreme Court of the State of California was made and entered on April 15, 1981, and is attached

hereto as Appendix "B". The notice from the Clerk of the Supreme Court of the State of California dated June 11, 1981 stating the lack of further jurisdiction is attached hereto as Appendix "C". The jurisdiction of this Court is invoked under 28 United States Code Sec. 1257(3) which provides that final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court;

> "By writ of certiorari, where the validity of a treaty or a statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

QUESTIONS PRESENTED

1. Did respondents violate appellant's rights under the Fourteenth Amendment of the U.S. Constitution to due process

of law in failing to pay him full back salary after the California Supreme Court had determined that he had been wrongfully deprived of his state employment by respondents' failure to afford him "due process" under the Fourteenth Amendment?

2. If that portion of California Government Sec. 19630 requiring a state terminated employee to file his petition which includes back salary within ninety days after the final decision of the board unconstitutional as being violative of the "equal protection" clause of the Fourteenth Amendment of the U.S. Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Due Process Clause and Equal Protection Clause of the Fourteenth Amendment, United States Constitution, text in Appendix "D" attached hereto.

2. California Government Code Sec. 19630, text in Appendix "E" attached hereto.

3. California Government Code Sec. 19502, text in Appendix "F" attached hereto.

4. California Government Code Sec. 19584, text in Appendix "G" attached hereto.

5. California Code of Civil Procedure Sec. 338, text in Appendix "H" attached hereto.

STATEMENT OF THE CASE

Petitioner was, and had been for several years, a permanent Civil Service employee of the respondent Department of Water Resources, State of California, holding a position of Associate Control System Engineer. On December 11, 1974, he indicated his intent to resign by letter to his supervisor. On December 17, 1974, before his resignation was accepted, he attempted to withdraw the same. Respondent Department of Water Resources, ignoring the attempted withdrawal, accepted and refused to permit petitioner to perform

his duties in such position.

Petitioner appealed to respondent California State Personnel Board within the time required, requesting that he be reinstated to his position. A hearing was held and on February 26, 1975, the board sustained the action of respondent Department of Water Resources. Other remedies, such as a direct appeal by letter to the director of respondent Department of Water Resources requesting reinstatement, were attempted by petitioner to no avail.

On January 5, 1976, petitioner filed a petition for a writ of mandate against respondents herein in the California Supreme Court, County of Sacramento, for a judgment requiring reinstatement and back pay allowance. Respondents' demurrer to the petition was sustained by the trial court and sustained by the California Court of Appeal, Third District. An appeal to the California Supreme Court

followed.

On September 22, 1978, the California Supreme Court reversed the judgment and remanded the same to the trial court for further proceedings on the ground that petitioner's rights afforded by the "due process" clause of the XIV Amendment of the U.S. Constitution had been violated by respondents in their use of a "secret rule" which had not been properly enacted under the Administrative Code of the State of California (See Armistead v. State Personnel Board, 22 Cal 3d 198).

On remand, the trial court ordered the reinstatement of petitioner, but referred the issue of back pay to respondent State Personnel Board. The latter action was done in spite of the protests of petitioner who sought to have the remaining issues determined by the trial court.

On February 23, 1979, respondent State Personnel Board, held a hearing

to determine the amount of back pay which might be due. Respondent Board determined that its decision became "final" on March 29, 1975, and in view of the fact that petitioner had not filed his petition for a writ of mandate until January, 1976, the same was not timely to afford him the benefits of back pay. Respondent Board thus interpreted the ninety day provision contained in Government Code Sec. 19630 in the foregoing manner. Petitioner was allowed approximately $6,000.00 instead of the more than $100,000.00 he lost for being out of State service for more than four years due to the wrongful acts of respondents.

Petitioner, after being denied a rehearing by respondents, filed, on December 17, 1979, in the Superior Court of California, a writ of mandate under California Code of Civil Procedure Sec. 1094.5 which permits inquiry into the validity of any final administrative order or

decision made as the result of a proceeding in which by law a hearing is required to be given. This petition was denied by said Superior Court of California, for the County of Sacramento, in Action No. 285935. On May 20, 1980, petitioner appealed to the California Court of Appeal, Third District. On February 4, 1981, said appeal court affirmed the judgment of the trial court and its written decision is attached hereto as Appendix "A". Petitioner filed his petition for a rehearing which was denied and then petitioned for a hearing in the California Supreme Court. Said Supreme Court, on April 15, 1981, denied his petition for a hearing. Said denial is attached hereto as Appendix "B".

REASONS RELIED ON FOR

THE ALLOWANCE OF THE WRIT

1. Application of California Government Code Sec. 19630 by Respondents Violated Petitioner's Rights to "Due

Process" Afforded Him by the Fourteenth Amendment of the United States.

Petitioner's claim that respondents violated his right to "due process" in denying him full back salary upon his reinstatement was raised both at the trial and appellate court levels. (Paragraph XVI of his petition for a writ of mandate in the Superior Court and the opinion of the Appellate Court, attached hereto as Appendix "A", show the foregoing to be true.) Respondents did not award petitioner his full back salary when he was ordered reinstated to his position because of his wrongful discharge by them. They took the position that because California Government Code Section 19630 states that back salary cannot be awarded if the state employee does not file and serve his petition within 90 days after the cause or ground arose. The statute states:

"Where an appeal is taken from a

decision of the board the cause of action does not arise until the final decision of the board."

The aforesaid statute also has a one year limitation for the filing of an action to correct a grievance related to any civil service law in the State or administration thereof. The said statute is one among many by which the State Personnel Board supervises the State civil service. It applies only to State civil service personnel. It has no effect on civil service employees of city, county or other governmental entities.

Petitioner had been wrongfully separated from his position by respondents applying a rule which had been illegally promulgated in the administrative process. See Armistead v. State Personnel Board, 22 Cal 3d, 198. However, he had filed his petition for a writ of mandate in January, 1976, approximately 9 months after the March 29, 1975 date respondents claimed was the "final" decision of the

respondent Personnel Board. This action, respondents claim, cut off his right to back salary by reason of the 90 day limitation in Government Code Sec. 19630.

The petitioner raised at the administrative level (transcript of hearing before Personnel Board), the trial court and the appeal court issue of "finality" of the decision. The trial court, after the remand from the Supreme Court in the first proceeding, ordered respondent Personnel Board to vacate its previous decision and to reinstate petitioner with rights to back salary to be determined. The decision of respondent Board, in February, 1975, thus was a nullity and of no effect. "Due process" was thus denied petitioner for over four years. The order to reinstate him in his old job in fact placed him in the same position as if he had never been separated from the service. "Due process" requires that he be made whole for the damages he has suffered.

On January 10, 1981, respondent Personnel Board set aside its previous decision in respect to petitioner, thus rendering the same a nullity. A second hearing was held and the decision resulting therefrom did not become "final" until September 19, 1979. The petition for a writ of mandate was filed in Superior Court on December 17, 1981, and within the 90 day provision.

In a Court of Claims case entitled Burroughs Corporation v. U.S., 272-79C, decided on August 12, 1980, the issue of finality is discussed. The aforesaid Court held that an erroneous interpretation of an administrative body is without finality. Therefore, "due process" was not afforded petitioner until September 19, 1979 when respondent Personnel Board lost all power to act.

2. The Application by Respondent of the 90 Day Clause in California Government Code Sec. 19630 Violated Petitioner's

Rights Under the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.

California Government Code Sections 19502 and 19584 are set forth herein as Appendicies "F" and "G", respectively. Section 19502, states in part:

> "In the event a resignation is set aside pursuant to this section, the person resigning shall be reinstated to his former position and paid his salary for the period he was removed from state service as the result of such resignation. From any such salary due there shall be deducted compensation that the employee earned, or might reasonably have earned, during any period commencing more than six months after the initial date of resignation."

The only statute of limitation contained in said section is that which requires the state employee to file his petition within 30 days from the date of resignation or the last date of service rendered. Nothing is said about a 90 day limitation as does Section 19630.

Section 19584 states in part as follows:

> "Whenever the board revokes or modifies a punitive action and orders that the employee be returned to his position it shall direct the payment of salary to the employee for such period of time as the board finds the punitive action was improperly in effect."

This section also requires a deduction for salary earned or might have been reasonably earned commencing more than six months after the initial date of the suspension.

It is seen therefore, that instead of restoring petitioner not only to employment but to all his lost benefits, respondents chose to ignore the said two statutes which clearly set forth the entitlements of the wronged state employee and applied Section 19630 which gave them an opportunity to reduce his benefits.

Section 19630 of the Government Code is only to be used in the state civil service. It is not the law for employees in the private sector. Here, the general statutes of limitation apply which are

Section 338 of the California Code of Civil Procedure (3 years) for obligations created by statute (Appendix "H") and 4 years on a written contract as set forth in California Code of Civil Procedure Sec. 337 which states in part:

> "Within four years: 1. an action upon any contract, obligation or liability founded upon an instrument in writing."

Section 19630 thus relegates State Civil Service employees to the status of second class citizens. Employees in the private employment are not limited by such a 90 day limitation to obtaining damages for wrongful discharge.

The "Due Process" and "Equal Protection" clauses of the Fourteenth Amendment are closely linked together. "Due Process" demands equality. The "Equal Protection" clause is a restriction on state governments and operates exclusively upon them. See Shelley v. Kraemer 334 US 1.

The existence of state action within

the purview of the equal protection clause of the Fourteenth Amendment can be determined only in the framework of the peculiar facts or circumstances of a case. See Burton v. Wilmington Parking Authority 365 US 715. It is class legislation, discriminating against some and favoring others, that is prohibited by the equal protection guaranty. See Douglas v. California, 372 US 353.

The contention that a state statute violates the constitutional guaranty of the equal protection of the laws is to be tested by considering whether there is a basis for the classification made by the statute. See Finley v. California 228 US 28.

The State Civil Service purpose, as set forth in the California Government Code, section 18500, states, in part:

"It is the purpose of this part:

(b) To promote and increase economy and efficiency in the state service.

(c) To provide a comprehensive

personnel system for the state civil service, wherein:

(4) The rights and interests of the state civil service employee are given consideration insofar as consistent with the best interests of the state.

(5) A high morale is developed among state civil service employees by providing adequately for leaves of absence, vacations and other considerations for the general welfare of the employees."

It thus would appear from the foregoing that the purpose of the state civil service system is to benefit both the state and employees. However, the California Legislature enacted Government Code Sec. 19630 and chose to insert therein the 90 day limitation in which to file for back salary regardless of the fact that the state may be the guilty party in the suspension, termination or discipline of its employee. This unreasonable limitation thus enables the State to escape its obligation when the Court holds that the State action was a violation of due process. The private employer or other

governmental agency would not be so fortunate if they lost suits for reinstatement in that response in damages for the entire lost benefits would be required.

The California Court of Appeal, Third District, Appendix "A", p. ix, adopts the following language which it feels justifies the 90 day limitation:

> "The 90-day clause needs no interpretation. It deals solely with salary arrearages accruing after the personnel board's final decision that is, 'subsequent to the date when such cause or ground arose'. It prevents inflation of back pay claims through the medium of lawsuit delay. It protects the public pocket book by minimizing claims for compensation accruing during the period following the personnel board's decision."

Such reasoning is not justified. It assumes that the ousted employee is going to sit around and do nothing for almost one year before filing his action. 90 days is unreasonably short to do what is necessary to retain counsel, get a transcript of the proceedings at the administrative hearing and gather the other evidence which may be

necessary for counsel to file the action. Ordinarily, in California, on a petition for a writ of mandate, the hearing is held in the Superior Court within 60 days from the date of filing.

The said 90 day requirement in Sec. 19630, is therefore arbitrary, unreasonable discrimination and without justification. It is therefore violative of the equal protection clause of the Fourteenth Amendment of the U.S. Constitution.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

Dated: July 3, 1981.

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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

C O P Y

APPENDIX "A"

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE THIRD APPELLATE DISTRICT

(Sacramento)

JAMES H. ARMISTEAD, Plaintiff and Appellant, v. STATE PERSONNEL BOARD and DEPARTMENT OF WATER RESOURSES, Defendants and Respondents.	3 Civil 19669 (Super. Ct. No. 285935) F I L E D FEB-4 1981 COURT OF APPEAL- THIRD DISTRICT WILFRIED J. KRAMER, Cler By_____, Deput

In the superior court, plaintiff filed a petition for a writ of mandate seeking to set aside a decision of defendant State Personnel Board (board) which had declined to award plaintiff back salary and benefits for a portion of the period of time following the wrongful termination of his employment with

the State Department of Water Resourses. The court denied the petition, after hearing, and rendered judgment denying the writ of mandate. This appeal is from that judgment.

This is the second time the matter has been before the appellate courts. In an earlier appeal, Armistead v. State Personnel Board (1978) 22 Cal.3d 198, filed September 22, 1978, the Court found plaintiff to have been wrongfully discharged. The court ruled that the action of the board was inconsistent with the provisions of the California Administrative Procedures Act and remanded the matter to the Sacramento Superior Court. The Supreme Court did not address the issue of backpay, if any, due to plaintiff as the result of his unlawful termination.

Upon remand, the superior court on December 5 and December 15, 1978, entered a judgment and peremptory writ of mandamus requiring the board to set aside its decision

and reconsider its action in light of the Armistead decision. The superior court by its judgment did not "limit or control in any way the discretion vested in (the board)." On January 10, 1979, the board ordered plaintiff to be restored to his position and the matter of back salary to be referred to a hearing officer if the parties could not agree upon the amount due, if any. When the parties could not agree, the matter was heard before a hearing officer of the board on February 23, 1979.

Following the presentation of evidence and both written and oral argument, the board, on June 20, 1979, adopted its decision which declined to award plaintiff any back salary for that period of time beyond March 29, 1975, the final date of the board's original decision of February 26, 1975. Concurring with the board, the trial court rendered judgment accordingly.

On appeal, plaintiff contends "the trial court's judgment" was based on numerous

"erroneous conclusions" of law which he spells out and with which we shall deal. However, we point out that there were no formal findings of fact or conclusions of law, nor was there a memorandum opinion. The trial court, in its order denying the writ, relied expressly upon the case of Ng v. State Personnel Board (1977) 68 Ca. App.3d 600.

I

Plaintiff contends the judgment was based on "erroneous conclusions" (a) that the board could "find" a statute of limitations (Gov. Code § 19630) applied; (b) "find" which statute applied to the first action; (c) "find" which decision of the board was "final" as applicable to the back salary claim; and (d) "find" that a condition precedent ("final action") was not required prior to the back salary claim. With these contentions in mind we discuss the actions of the board and the trial court.

The Board, in its decision of June 20, 1979, concluded that any back salary due plaintiff for his improper termination from state employment is limited by the provisions of Government Code section 19630, which requires in pertinent part that all judicial actions or proceedings seeking back salary be filed and served within 90 days after the cause of action arose.[1] The cause of action arose when the board's decision became final, which was 30 days after service of the

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1 Government Code section 19630 provides in full: "No action or proceeding shall be brought by any person having or claiming to have a cause of action or complaint or ground for issuance of any complaint or legal remedy for wrongs or grievances based on or related to any civil service law in this State or the administration thereof unless such action or proceeding is commenced and served within one year after such cause of action or complaint or ground for issuance of any writ or legal remedy first arose. Such a person shall not be compensated for the time subsequent to the date when such cause or ground arose unless such action or proceeding is filed and served within 90 days after such cause or ground arose. Where an appeal is taken from a decision of the board the cause of action does not arise until the final decision of the board." (Emphasis added.)

decision upon the parties. (Board Rule 70; Cal. Admin. Code, tit. 2, § 70.)

The pertinent dates in the chronology of this matter are as follows:

December 11, 1974 - Plaintiff submits resignation to Department of Water Resources.

December 18, 1974, Department of Water Resources accepts resignation.

December 20, 1974 - Plaintiff files appeal to State Personnel Board to set aside resignation.

February 21, 1975 - Hearing Officer submits proposed decision to deny plaintiff's appeal.

February 26, 1975 - Board adopts proposed decision denying appeal.

February 27, 1975 - Board sends copy of decision to plaintiff by certified mail.

February 28, 1975 - Plaintift receives board's decision.

March 29, 1975 - Board decision is final under Board Rule 70 (i.e., 30 days after February 27, 1975).

August 29, 1975 - Plaintiff files petition for rehearing with board.

October 29, 1975 - Petition for rehearing dismissed for lack of jurisdiction under Board Rule 69 (rehearing must be filed within 30 days after service of the decision, i.e., no later than March 29, 1975).

January 5, 1976 - Plaintiff files petition for writ of mandate under Code of Civil Procedure section 1094.5 in Sacramento Superior Court.[2]

Plaintiff thus waited over nine months to file his petition for judicial review when he was allowed but 90 days by law. He was thus foreclosed by the express provisions of Government Code section 19630 from receiving back pay for the period subsequent to the date of the board's final decision. (March 29, 1975).

The case of Ng v. State Personnel Board, supra, 68 Cal. App.3d 600, a decision of this

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2 The above facts are not in dispute.

court expressly relied upon by the trial court, is dispositive of the "finality" issues and other issues involving the 90-day limitation contained in Government Code section 19630. In Ng, plaintiff petitioned the superior court for a writ of mandate to review a personnel board demotional decision almost one year after the board decision became final. We held the 90-day provision of section 19630 was applicable and explained its purpose in the following language, from which we will not now depart:

"It (Gov. Code, § 19630) establishes a one-year statute of limitations on lawsuits seeking review of State Personnel Board decisions. The period commences when the 'cause of action . . . first arose.' According to the statute's last sentence, the cause of action does not arise until the board's 'final decision.' The next-to-last sentence establishes an inner statute of limitations. It bars recovery of compensation 'for the time subsequent to the date when

such cause or ground arose' unless the lawsuit is filed and served within 90 days 'after such cause or ground arose.'

"The 90 day-clause needs no interpretation. It deals solely with salary arrearages accruing after the personnel board's final decision, that is, 'subsequent to the date when such cause or ground arose.' It protects the public pocket book by minimizing claims for compensation accruing during the period following the personnel board's decision." (Id. at pp. 606-607)

We made it clear that demotions and dismissals are in the same category insofar as procedural due process rights are concerned, and held the employee's recovery of back pay was limited to the period between the date of his original demotion and the date of the original board decision notwithstanding proceedings required by the superior court involving the correction of procedural

irregularities by the board. (Id. at pp. 606-607) In this connection, we pointed out as to the Ng fact situation that: "The present case is idiosyncratic because the personnel board rendered two demotion decisions, one on February 6, 1974, when the board filed a decision later invalidated by the superior court, and a second on July 23, 1975, which was sustained by the superior court. Although the first of these decisions was nullified, it represented the fulfillment of plaintiff's right to respond to the accusation; thus it establishes the date when the needs of procedural due process were satisfied. Plaintiff's back pay entitlement commenced on October 1, 1973, and ended on February 6, 1974." (Id. at p. 608.)

Thus, in Ng the employee's recovery of back salary was limited to the period between the date of his original demotion and the date of the original board decision.

Contrary to plaintiff's contention here that the board's decision was not "final" until June 20, 1979, the Ng rationale compels the conclusion that the first board decision in 1975, albeit nullified for failure of certain board regulations to conform to technical procedures in the Administrative Procedures Act, was final for purposes of Government Code section 19630 since it was a full and fair hearing meeting all the requirements of due process of law. (See ng. v. State Personnel Board, supra, at pp. 607-608.)

We reaffirm the Ng case and apply its rationale here, since to accept plaintiff's contentions as to the meaning of section 19630 would permit a person in a position such as plaintiff to stretch the limitation on judicial review of board salary decisions far beyond the 90-day period established by the Legislature and defeat the purpose of Government Code section 19630 as stated in Ng "(to prevent

the) inflation of back pay claims through the medium of lawsuit delay." (Id. at p. 607.)

Plaintiff asserts the hearing officer and the board had no authority under the law at apply Government Code section 19630 after remand from the trial court. We take this to be a jurisdicational challenge, since it is briefed under a heading which contends the trial court erred in "concluding" the board could "find" that a statute of limitations applied. The contention is meritless. The trial court remanded the case to the board in light of the decision in Armistead, noting that the issue of back salary was to be litigated before the board without any limit or control over the board. Plaintiff did not appeal this 1978 judgment. Moreover, the board has adjudicating powers derived directly from the California Constitution. It is, in effect, a court of limited jurisdiction, which is complete over matters

involving the civil service statutes. (Shepherd v. State Personnel Board (1957) 48 Cal.2d 41, 46-47; Fair Political Practices Com. v. State Personnel Bd. (1978) 77 Cal.App.3d 52, 55.) In short, under the 1978 trial court judgment, the board was directed and by the state Constitution was required to apply applicable laws, including the provisions of Government Code section 19630, to plaintiff's claim for back salary.

Plaintiff contends that Government Code sections 19502 and 19584 supercede the provisions of Government Code section 19630. This is not so. Section 19502 relates to the rights and privileges of an employee upon resignation or reinstatement, but does not provide for any limitation on the recovery of backpay or the requirement of diligence in filing a court action related to compensation which an employee may recover against his state employer. Section 19584 merely provides that employees

who are restored to their position shall receive back salary in accordance with appropriate board orders.

Plaintiff claims that the period of limitation, if any, is governed not by Government Code section 19630, but by the general provisions of Code of Civil Procedure section 338 which allow a period of three years to bring any action upon "a liability created by statute." This is also incorrect. Government Code section 19630 is a specific statute of limitations governing plaintiff's right to back salary following his separation from state service. Plaintiff accepted his employment relationship with the state subject to both this statutory limitation as well as the rules and regulations of the State Personnel Board. (Boren v. State Personnel Board (1951) 37 Cal.2d 634, 639; Gilmore v. Personnel Board (1958) 161 Cal. App.2d 439, 449.) Section 19630, and other provisions of the Civil Service Act, were

specifically designed to govern the employment of all state employees. (See Gov. Code, § 18500 et seq.) General limitation statutes, such as Code of Civil Procedure section 338, have no application to this case.

Plaintiff contends his original petition for writ of mandate, filed on January 5, 1976, merely sought declaratory relief relative to the procedural irregularities of the board, and that the present issue of back salary should be bifurcated from the issues of wrongful dismissal, allowing full restoration of back salary upon remand of the original action. This contention ignores the plain language of Government Code section 19630, which provides in part that "(no) action or proceeding shall be brought" beyond a period of one year after a cause of action or "ground for issuance of any writ or legal remedy first arose." The statute requires "such action" be filed and served within 90 days in order to

recover compensation. The statute clearly applies to any action or proceeding, for any writ or legal remedy, including that for declaratory relief. If this were not so, employees could avoid the 90-day limitation simply by including a cause for declaratory relief in any attempted judicial review of a board decision.

In Ng, this court measured back salary by the period of time between the improper demotion and the original board decision, even though, as here, there were interim trial court proceedings which had nullified the original board decision because the first decision represented plaintiff's "right to respond to the accusation" and "the needs of procedural due process were satisfied." (68 Cal.App.3d at p. 608.) Contrary to plaintiff's assertion that the 90-day clause was "arbitrarily and capriciously applied" by the board, he was given every right to present evidence to the board for the purpose of setting aside his

resignation. There was no violation of procedural due process in either the original board hearing or the original board decision. Plaintiff did not challenge the hearing procedures of the board in his earlier case (Armistead v. State Personnel Board, supra, 22 Cal.3d 198) nor did that case find any violation of procedural due process of law pertaining to such hearing procedures.

II

Plaintiff contends defendants waived or abandoned their "defense" under Government Code section 19630 following a remand of the case by the Supreme Court, and the trial court based its judgment on the "erroneous conclusion" they had not. Plaintiff suggests that in order for the statute of limitations "defense" to be properly asserted, defendants were under a duty "to appear in court before the case was remanded to the board." The contention is meritless.

At all stages of the proceedings, defendants have continually asserted the statute of limitations in Government Code section 19630 as a defense. It was raised in the initial answer, and following remand it was raised in repeated communications to either plaintiff or the superior court. When the judgment granting the peremptory writ of mandamus was entered on December 15, 1978, it merely required the board to "reconsider its action in the light of the decision of Armistead v. SPB, et al. of the Supreme Court" and "to take any further action especially enjoined upon you by law; but nothing in this judgment or in that writ shall limit or control in any way the discretion legally vested in defendant." Following remand, the board entered its order on January 10, 1979, referring the matter to the hearing officer "in the event the parties cannot agree as to the salary, if any, due appellant." This board order was filed with the court in full

compliance with its judgment and writ. The parties were in dispute as to the back salary due plaintiff and accordingly the contested hearing was held with respect to that issue. This gave rise to the board's second decision of June 20, 1979, which is the subject of this action.

If the trial court could somehow be shown to have intended to restrict the board's discretion on that issue, its judgment did not do so. Had plaintiff believed the original trial court judgment was erroneous or improper, his remedy was to perfect an appeal to this court, or to seek an extraordinary writ. He did neither, but rather acquiesced in the ensuing board proceedings. He cannot collaterally attack the prior judgment in this new appeal from the trial court's subsequent judgment. The issue became res judicata upon plaintiff's failure to appeal the first judgment of the trial court. (See Pillsbury v. Superior Court (1937) 8 Cal.

2d 469,472.)

III

Plaintiff contends Government Code section 19630 is a "90-day trap" which violates his rights to due process of law and equal protection of the laws under the federal and state Constitutions.

Government Code section 19630 has been a part of the Government Code since 1945 and part of the Civil Service Act since its adoption in 1937 (Stats. 1937, ch. 753, § 52 p. 2092; Stats. 1945, ch. 123, § 1, p. 570). The Supreme Court has held that state employees are charged with notice of such provisions, and are presumed to have known these and all applicable rules of the civil service when entering state employment. (See Boren v. State Personnel Board, supra, 37 Cal.2d at pp. 639, 641.) Government Code section 19630, which has been placed in the State Civil Service Act by the Legislature, is not a "secret rule" akin to the obscure personnel transactions

manual which was struck down in Armistead, for the reason that such rule was not published according to law.

Plaintiff contends the Armistead decision may be likened to the cases of Skelly v. State Personnel Bd. (1975) 15 Cal.3d 194, and Barber v. State Personnel Bd. (1976) 18 Cal.3d 395, in which the Supreme Court found the civil service disciplinary process to be constitutionally defective. There is no analogy since the court did not deal with a violation of procedural due process in Armistead. Rather, the court struck down a substantive rule under which plaintiff resigned, requiring his reinstatement.

The fact that employees in the private sector are not subjected to a similar 90-day limitation is no reason for concluding that employees of the state are denied equal protection of the law. It is a well-recognized principle that differences occur and are to be expected in

the statutory treatment of the private and public labor sectors. (See Grasko v. Los Angeles City Board of Education (1973) 31 Cal.App.3d 290,301.)

IV

Plaintiff contends "the trial court's judgment was based on the erroneous conclusion that (defendants were) not obligated to pay back salary from time of requested reinstatement to actual return to work."

His argument is that since three months passed between the date of his request for reinstatement after the Armistead decision and his actual reinstatement, he is entitled to 90 days of what he calls "due processing" pay.[3] He relies upon three cases, none of which support his contention.

In Pasquinelli v. State of California

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[3] He asserts he demanded reinstatement on October 22, 1978. The date of actual reinstatement was January 22, 1979.

(1975) 45 Cal.App.3d 457, this court held that Code of Civil Procedure section 338, subdivision 1 (fixing a three-year limitation on actions "'upon a liability created by statute'"), was the appropriate limitation period with respect to judicial review of disability claims under Labor Code section 4800. We rejected the application of other Labor Code limitations. The court declined to apply Government Code section 19630, which is now before us, because that statute was designed to limit review of civil service laws, not disability claims under the Labor Code. Here, there is no question that plaintiff sought the judicial review of a board decision which was governed specifically by Government Code section 19630, and no other statute.

In Lerner v. Los Angeles Board of Education (1963) 59 Ca.2d 382, a city board of education restored the plaintiff's credential as a teacher but then declined

to reinstate the teacher or to afford him a hearing. The court held that the three-year statute of limitations (Code of Civ. Proc., § 338, subd. 1) did not run until the credential was actually restored by the city board because, until such time, plaintiff was legally incapable of protecting his rights. The case has no application here, since plaintiff was legally capable of filing his writ of mandate within the 90-day requirements of Government Code section 19630, and the defendants afforded plaintiff a complete (and fair) hearing process and offered prompt reinstatement. Plaintiff in this case was offered immediate reinstatement by the Department of Water Resources after the Armistead decision but those offers were rebuffed by plaintiff, who stated that he "decline(d) to return to work" because it would jeopardize his "present court action." Neither the department nor its counsel, the Attorney General, were

ever successful in getting plaintiff to promptly return to work prior to actual reinstatement by board order. The record does not show there was ever a good-faith demand for reinstatement by plaintiff which would warrant the granting of any further back salary before his actual reinstatement in January 1979 by board order.

In Monroe v. Trustees of the California State Colleges (1971) 6 Cal.3d 399, also relied upon by plaintiff, the court held that after a 1968 judicial invalidation of the loyalty oath, a former employee dismissed in 1950 for failing to take the oath was entitled to demand reinstatement in 1968, but that he was not entitled to any backpay or benefits between 1950 and 1968 because of the running of the statute of limitations. The court permitted accrued backpay after 1968 because the defendant summarily denied reinstatement to the plaintiff without a hearing or any findings. The factual setting is inapposite.

V

Plaintiff contends the trial court's judgment was based on the erroneous conclusion that defendants had awarded plaintiff payments for lost health benefits and vacation. Plaintiff has overlooked page 5 of the board's decision wherein it was determined that plaintiff was to be paid "compensation in the amount of $5,448.00 (plus interest) minus regular deductions and plus vacation and sick leave credits for the period December 18, 1974 through March 29, 1975." There is no requirement of law that any payment be made for lost voluntary health plan benefits which an employee may have had if he had continued to be an employee. (See Gov. Code, § 19502.)

VI

Plaintiff contends it was error to refuse him attorney fees. He sought attorney fees in connection with his first action to obtain reinstatement and also

sought such fees in connection with the present action involving back pay.

In connection with the refusal to grant plaintiff attorney fees in the first action, the order denying his motion was made on April 4, 1979, and the final judgment remanding the matter back to defendants (as required by Armistead) was entered on December 15, 1979. Plaintiff did not appeal, but when defendants refused him all the back pay he thought he should have, he brought this proceeding. In connection with his motion for a new trial he again raised the attorney-fee issue. Technically, plaintiff is procedurally foreclosed from now raising an issue from the Armistead case due to his failure to appeal. However, since he raised the issue here we consider, on its merits, the question of his right to attorney fees.

In each case, plaintiff based his right to attorney fees upon Government Code section 800 and Code of Civil Procedure

section 1021.5. The motion was heard and briefed before the trial court and is briefed less extensively on appeal. It will suffice to point out briefly here that plaintiff's claim of right to attorney fees does not fall within the scope of either section 800 or section 1021.5.

Government Code section 800 allows limited attorney fees to a party only if he shows that a determination of a government agency affecting him "was the result of arbitrary or capricious action or conduct . . . ." No arbitrary or capricious conduct appears anywhere in this matter. Defendants acted on what they believed were valid rules and regulations until stated otherwise in Armistead. In this, the second case, we see no arbitrary or capricious action but only an application of valid statutes and rules, properly interpreted. (See Gassman v. Governing Board (1976) 18 Cal.3d 137, 148-149.)

Code of Civil Procedure section 1021.5

provides as follows: "Upon a motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any. With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities, and no claim shall be required to be filed therefor."

The above statute is permissive, and relies upon the exercise of the sound discretion of the trial court. As stated in Woodland Hills Residents Assn. Inc. v. City

Council (1979) 23 Cal.3d 917, 935-936, "the statute directs the judiciary to exercise judgment in attempting to ascertain the 'strength' or 'societal importance' of the right involved (and) courts should generally realistically assess the significance of that right in terms of its relationship to the achievement of fundamental legislative goals." Applying this rationale, we do not perceive any abuse of discretion in the trial court's refusal to allow attorney fees. Contrary to plaintiff's contention, he has not conferred a significant benefit on the public or a large class of persons, which is an essential criterion in the application of section 1021.5. (Cf. County of Inyo v. City of Los Angeles (1978) 78 Cal.App.3d 82, 90.)

VII

Plaintiff contends that "sound public policy dictates that a government agency not be allowed to avoid issues by default."

xxx

This seems a reasonable statement; however, plaintiff makes no attempt to relate it to this case, but merely refers by number to the previous appeal filed in this court which became Armistead v. State Personnel Board, supra, 22 Cal. 3d 198.

The judgment is affirmed.

REGAN, J.

We concur:

PUGLIA, P.J.

PARAS, J.

APPENDIX "B"

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102

APR 15 1981

I have this day filed Order

HEARING DENIED

In re: 3/cv. *No.* 19669
Armistead

vs.
Calif. State Personnel Bd.

Respectfully,

Clerk

Appendix B

APPENDIX "C"

J. L. KAVANAGH
CHIEF DEPUTY
DEPUTIES
REMO C. MATTEOLI
G. E. SCHNEIDER
JOHN C. ROSSI
ROBERTA NICCO
SAN FRANCISCO
ROBERT F. JOHNSON
R. D. BARROW

OFFICE OF THE CLERK

Supreme Court of California

SAN FRANCISCO, CALIFORNIA
LAURENCE P. GILL, CLERK

SAN FRANCISCO 94102
LOS ANGELES 90010
SACRAMENTO 95814

June 11, 1981

Mr. James H. Armistead
1500 7th Street, 6G
Sacramento, CA 95814

Re: 3 Civ. 19669 - Armistead v. State Personnel Board

Dear Mr. Armistead:

No action will be taken on your letter of April 21, 1981, received this date, for the reason that the court is without jurisdiction to reconsider its decision.

Very truly yours,

LAURENCE P. GILL
Clerk of the Supreme Court

By: J. L. KAVANAGH
Chief Deputy

JLK:ms

APPENDIX "D"

FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION

Section 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX "E"

CALIFORNIA GOVERNMENT CODE SECTION 19630--

When Action Barred: Compensation After Cause Arose: Cause of Action Atter Final Decision ot Board.

"No action or proceeding shall be brought by any person having or claiming to have a cause of action or complaint or ground for issuance of any complaint or legal remedy for wrongs or grievances based on or related to any civil service law in this State or the administration thereof unless such action or proceeding is commenced and served within one year atter such cause of action or complaint or ground for issuance of any writ or legal remedy first arose. Such a person shall not be compensated for the time subsequent to the date when such cause or ground arose unless such action or proceeding is tiled and served within 90 days atter such cause or ground arose. Where an appeal is taken from a decision of the board the cause of action does not arise until the final decision of the board."

APPENDIX "F"

CALIFORNIA GOVERNMENT CODE SECTION 19502--

Resignations: Subject to board rules: Effect on rights and privileges: Waiver: Conformity of records: Setting aside resignation: Petition: Time for

"Resignations from the state civil service are subject to board rules. A resignation, except as provided in this section, does not jeopardize any rights and privileges of the employee except those pertaining to the position from which he resigns. A written resignation may expressly waive all or any rights or privileges provided for by this act, including but not limited to, accumulated vacation, and in such event the records of the board shall be made to conform therewith. No resignation shall be set aside on the ground that it was given or obtained pursuant to or by reason of mistake, fraud, duress, undue influence or that for any other reason it was not the free, voluntary and binding act of the person resigning, unless a petition to set it aside is filed with the board within 30 days after the last date upon which services to the state are rendered or the date the resignation is tendered to the appointing power, whichever is later. In the event a resignation is set aside pursuant to this section, the person resigning shall be reinstated to his former position and paid

his salary for the period he was removed from state service as the result of such resignation. Fraom any such salary due there shall be deducted compensation that the employee earned, or might reasonably have earned, during any period commencing more than six months after the initial date of resignation."

APPENDIX "G"

CALIFORNIA GOVERNMENT CODE SECTION 19584--

Revocation of Punitive Action: Payment of Salary: Deductions From Amount Accrued.

"Whenever the board revokes or modifies a punitive action and orders that the employee be returned to his position it shall direct the payment of salary to the employee for such period of time as the board finds the punitive action was improperly in effect.

Salary shall not be authorized or paid for any portion of a period of punitive action that the employee was not ready, able, and willing to perform the duties of his position, whether such punitive action is valid or not or the causes on which it is based state facts sufficient to constitute cause for discipline.

From any such salary due there shall be deducted compensation that the employee earned, or might reasonably have earned, during any period commencing more than six months after the initial date of the suspension."

APPENDIX "H"

The period of time to commence an action: California Code of Civil Procedure Sec. 338

"Within three years:

1. An action upon a liability created by statute, other than a penalty or forfeiture."